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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 633

CHARLES McLAURIN,

*Petitioner,*

—v.—

CITY OF GREENVILLE, MISSISSIPPI,

*Respondent.*

(Two Cases)

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CHARLES EARL COBB,

*Petitioner,*

—v.—

CITY OF GREENVILLE, MISSISSIPPI,

*Respondent.*

(Two Cases)

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above-entitled cases on June 13, 1966. Rehearing was denied on July 8, 1966.

## Opinions Below

The opinions of the Supreme Court of Mississippi are reported at —— Miss.——, 187 So. 2d 854, 860, 861 (1966) and are set forth in the Appendix, pp. 1a-13a, 15a, 17a, 19a *infra*. The judgments of the Supreme Court of Mississippi are set forth in the Appendix, pp. 14a, 16a, 18a, 20a, *infra*.

## Jurisdiction

The judgments of the Supreme Court of Mississippi were entered June 13, 1966 (RA 220; RB 163; RC 174; RD 169).[1]

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States. Pursuant to Rule 23(5) of the Rules of this Court, a single petition for certiorari is filed seeking review of the four related judgments below.

## Questions Presented

1. Two Negro girls had been tried in a segregated courtroom of the Greenville, Mississippi, Municipal Court for seeking to use an all-white municipal park. The trial had been attended by about 300 white and Negro spectators, and, as the spectators left the Municipal Building, petitioners

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[1] References herein to the record in McLaurin's breach of the peace case (No. 3429 below) are cited as RA; to McLaurin's resisting arrest case (No. 43498 below) as RB; to Cobb's breach of the peace case (No. 43436 below) as RC; and to Cobb's resisting arrest case (No. 43497 below) as RD.

Charles McLaurin and Charles Earl Cobb, Negro civil rights workers, successively mounted the steps in front of the building and protested the segregation and racial discrimination exemplified in the trial and conviction of the girls.[2] Neither petitioners nor any person in the crowd attempted or advocated violence or incited to riot. A large number of armed Greenville policemen were in and around the building. Apprehending that the crowd might become unruly, but without taking any steps to contain it, police arrested petitioners for speaking without a permit. Petitioners were later charged with, and convicted of, "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace," in violation of Miss. Code Ann. §2089.5 (Supp. 1964), which punishes any person "who disturbs the public peace, or the peace of others, by violent, or loud . . . or boisterous conduct or language, . . . or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act . . . ." They were also charged with, and convicted of, resisting lawful arrest on evidence that, when seized by the arresting officers, they braced their feet and later went limp. On this record, do petitioners' convictions offend the First and Fourteenth Amendments to the Constitution of the United States because:

a. Petitioners were convicted for exercising their rights of free speech, assembly and petition?

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[2] The Supreme Court of Mississippi subsequently agreed with petitioners that the convictions of the girls were entirely lacking in evidentiary support and were unconstitutional under this Court's decision in *Wright* v. *Georgia*, 373 U. S. 284 (1963). See p. 8, n. 6, *infra*.

b. Petitioners were convicted upon no evidence of guilt?

c. Petitioners were convicted under a statute indistinguishable from that declared facially unconstitutional in *Cox* v. *Louisiana*, 379 U. S. 536, 551-52 (1965)?

2. Does petitioner Cobb's conviction for resisting arrest offend the Equal Protection Clause of the Fourteenth Amendment because the trial court refused to permit him to show a pattern or practice of systematic prosecutorial exercise of peremptory challenges to strike Negroes from the petit jury?

## Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Mississippi:

Miss. Code Ann. §2089.5 (Supp. 1964)—Disturbance of the public peace, or the peace of others.

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

This case also involves the following ordinance of the City of Greenville, Mississippi:

> Code of Ordinances of the City of Greenville, Section 252—Resisting Arrest.
>
> Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with, hinder or prevent, such officer from discharging his duty, shall be guilty of a misdemeanor.

## Statement

Petitioners Charles McLaurin and Charles Earl Cobb, Negro civil rights workers, were arrested on July 1, 1963 in the City of Greenville, Mississippi and charged with breach of the peace, in violation of Miss. Code Ann. §2089.5 (Supp. 1964), set forth p. 4, *supra*, and with resisting arrest, in violation of a Greenville City ordinance, set forth p. 5, *supra* (RA 3; RB 8; RC 5; RD 6).

On July 3, 1963, petitioners were tried and convicted on these charges in the Municipal Court of the City of Greenville (187 So. 2d at 855; RA 206).

Petitioners appealed to the County Court of Washington County for trials *de novo* on their four charges. There, in four separate jury trials,[3] petitioners were again convicted

[3] Petitioner McLaurin was tried and convicted of breach of the peace on September 16, 1963 (RA 13); he was tried and convicted of resisting arrest on September 20, 1963 (RB 16). Petitioner Cobb was tried and convicted of breach of the peace on September 17, 1963 (RC 13-14); he was tried and convicted of resisting arrest on September 20, 1963 (RD 16).

and sentenced to pay a fine of $100.00 and serve a term of 90 days in the city jail on each charge.

Petitioners appealed their convictions to the Circuit Court of Washington County, which affirmed.[4] Appeals were allowed to the Supreme Court of Mississippi, where the four cases were consolidated for argument.[5]

On June 13, 1966, the Supreme Court of Mississippi affirmed petitioners' convictions in four separate orders, with an extensive opinion in the *McLaurin* breach of the peace case (187 So. 2d at 855-60; RA 206-19; RB 161-62; RC 173; RD 168). Petitioners' suggestions of error were overruled on July 8, 1966 (RA 222; RB 165; RC 176; RD 171).

In each of the four cases covered by this petition and others tried in the same court during the same week, counsel for petitioners attempted to show a pattern or practice of systematic prosecutorial exercise of peremptory challenges to strike Negroes from the petit juries. In the cases first tried—petitioners' breach of the peace prosecutions—counsel was permitted to state for the record the number of Negroes peremptorily excused by the prosecutor. In the Cobb resisting-arrest case, counsel tried to introduce the figures on Negro peremptory challenges which he had compiled "in these cases all during the week" (RD 24).

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[4] Petitioners' breach of the peace convictions were affirmed on February 27, 1964 (RA 106-07; RC 82-83); petitioners' resisting arrest convictions were affirmed on July 24, 1964 (RB 80; RD 87).

[5] After submission of the cases to the Supreme Court of Mississippi, it was discovered that the affidavits upon which the charges were based were not included in the records, although they had been designated by petitioners in their notice of designation of the record. Respondent City of Greeenville suggested a diminution of the record, which was sustained by the court, thereby correcting the omission. (—— Miss. ——, 180 So. 2d 927 (1965); 187 So. 2d at 855.)

The trial court disallowed this proffer on the stated ground that "This is a separate case altogether" (*Ibid.*). Counsel explained that "only [to] show what happened in one case would not be enough to prove systematic exclusion, but if we can show a pattern of what happened in enough cases, then we are in a better position to argue [the] contention" (RD 25). The court adhered to its ruling, stating:

> . . . Your motion is well in the record and your motion specifically states what you are seeking to do and the Court understands that and the record shows that, and if this Court is in error by not permitting you to show that pattern, then you don't have to show that pattern to the Supreme Court at all, the Supreme Court will reverse it because it didn't let you do it. Your record is all right for that purpose (RD 25-26).

***Summary of the Evidence***

The arrest of petitioners was precipitated by the trial of two Negro girls in the Municipal Court of the City of Greenville on July 1, 1963, on charges of disorderly conduct (App. p. 3a; 187 So. 2d at 856; RA 208). Petitioners attended the trial, along with about 150 other Negroes and an approximately equal number of whites. During the trial petitioner McLaurin attempted to sit on the side of the courtroom customarily reserved for whites, but he was ordered out of that section (RA 24, 30-33, 64, 75-76; RB 55-56, 65-66). Petitioner McLaurin left the courtroom and protested the segregated seating pattern to police chief W. C. Burnley (RA 208). His protest was futile, and he was then denied readmission to the courtroom (RA 208). Petitioners then left the Municipal Building, which housed the Municipal Court and the police station, and stood out-

side on the sidewalk waiting for the trial to end and for the spectators to emerge (RA 75-76).. About 50 Negroes were standing outside the building, having been denied admission to the courtroom because the Negro side was completely filled (although there was some space on the white side) (RA 76).

The girls were convicted by the Municipal Court.[6] As the spectators left the municipal building, petitioner McLaurin began to address them in a loud voice, protesting the conviction of the girls and the evils of segregation and calling for mass Negro voter registration to achieve equality (RA 78-79, 90, 92). Police officer Carson then arrested petitioner McLaurin (RA 209). Next, petitioner Cobb began to address the crowd in much the same vein as petitioner McLaurin, and he was arrested by police officer Martin (RC 30, 59-60).

Because the nature and content of petitioners' speeches and the context in which they were delivered are of crucial importance to decision of this case, the evidence adduced in these four cases will be summarized separately, as follows:

***McLaurin Breach of the Peace Case***

Arresting officer Carson testified that petitioner McLaurin loudly protested the Court's decision, saying that

[6] At their trial police officers testified that they were arrested and charged with disorderly conduct because they refused to leave a public park when the police ordered them to do so because police feared that, if they stayed, the white crowd that was gathering around them would become violent. Their convictions were subsequently reversed by the Mississippi Supreme Court in *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965) and *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

it was wrong, that segregation was wrong and that something should be done to right these wrongs (RA 25, 28, 36, 209). Apprehending that the crowd was becoming "tense" (RA 27, 209), Carson told McLaurin that he could not continue speaking without a permit (RA 28) and, when McLaurin continued, arrested him (RA 28). Police captain Harvey Tackett and police chief W. C. Burnley also testified for the City of Greenville. Captain Tackett was unclear as to the exact content of petitioner McLaurin's speech, but he recognized it as a speech of protest against segregation and a general query to the crowd as to what they were going to do about it (RA 45, 210). Chief Burnley was also near the scene and testified that McLaurin's speech included queries to the crowd: "What are you going to do? Are you going to let this happen? Statements of that type" (RA 54, 211).

None of the prosecution witnesses heard any profane language on the part of petitioner McLaurin (RA 36-37, 51-52), nor any call for violence (RA 37-38), nor was there any testimony that McLaurin's speech disturbed a court in session.

Petitioner McLaurin testified on his own behalf. He described the content of his speech as follows:

> I was saying different things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50% of the population is Negro and that they could have used the park or any other thing had they been registered voters (RA 77, 213).
>
> . . . [T]he words that I was using wouldn't have caused them to jump—to go in there and try to beat up the

> Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified (RA 79, 213-14).

Petitioner McLaurin also testified as to what he intended by his speech:

> I meant that if they were registered—if the people would register to vote, were to get in line and exercise their duties and responsibilities as citizens, as Negro citizens, and as citizens of the United States, they could change some of these things. They could change the policy of being arrested in a park that they paid for as well [sic] any other people and that there wouldn't be such parks that was designated for whites and for Negroes. . . . And, the only thing that I had in mind was to get [the crowd] to register to vote and to realize what was happening, and I felt that I had a right to do this under the 1st Amendment (RA 78-79).
>
> • • • • •
>
> I was going to tell them what had taken place with respect to the park and with my being asked to leave the courtroom. That's what I was speaking of, I was speaking of the fact that the kids had been arrested because they used the public park that had been set aside for whites and the fact that I was thrown out of the courtroom because I had used the side that had been set aside for the whites on the right side of the building, you know (RA 92).

All three prosecution witnesses agreed that the predominantly Negro crowd of approximately 200 was "mumbling"

(RA 27, 42, 45-46, 57) and appeared upset, but no threat of violence, either directed at the speaker or at city authorities, was heard nor did anyone in the crowd appear to be armed (RA 42, 68). After the arrest of petitioners, the crowd was easily dispersed (RA 48; RD 47).

***McLaurin Resisting Arrest Case***

Officer Carson testified that, after he told petitioner McLaurin that he was under arrest, McLaurin kept addressing the crowd. Carson testified that he took McLaurin by the arm and then pushed him from behind into the police station (RB 33-34). McLaurin tried to brace his feet and "began to pull back" (RB 33), but offered no greater resistance to Carson, who outweighed him by 60 pounds (RB 38, 59). Once inside the police station, McLaurin fell to the floor and lay motionless there (RB 34). He was then picked up and carried to the sergeant's desk for booking, after which he voluntarily got up (RB 35).

McLaurin testified that after he had begun to speak, Carson came up to him and told him that he could not speak without a permit (RB 60). McLaurin continued to speak, and Carson took him by the arm and told him that he was under arrest (RB 60). Carson then pushed him from behind into the police station. While McLaurin did not struggle, he concededly made Carson supply the energy needed to propel him into the police station (RB 60-61). McLaurin admitted that, once inside the police station, he went limp (RB 61). His action, he testified, was equivalent to saying: "[H]ere's my body, it is you that wants me in jail, then, carry me to jail" (RB 68).

***Cobb Breach of the Peace Case***

Arresting officer James Martin testified that petitioner Cobb asked the crowd: "[A]re we going to stand for this, and watch my partner go to jail, what are you going to do about it?" (RC 30). Captain Tackett also testified as to what Cobb said:

> He said, you see what they are doing to him, are you going to stand here and let them do it? He said this is everybody's fight and so on (RC 43).

And police chief Burnley testified that Cobb said:

> Are you going to take this, they are taking him away to jail, let's all go to jail (RC 51).

But Martin and Burnley both admitted that Cobb did not encourage the crowd to commit any act of violence (RC 37, 55).

Petitioner Cobb testified that, after McLaurin had been arrested, he stood on the steps of the Municipal Building, "and I was telling them that the two girls had been arrested for using a public park paid for with your tax money. I said McLaurin has been taken to jail for trying to tell you about it, and that I think we all ought to be in jail with McLaurin" (RC 59). Cobb was told by Martin that he was under arrest for speaking without a permit (RC 59).

Cobb explained what he meant when he said, "I think we all ought to be in jail with McLaurin":

> [T]he point that I was trying to bring out to the people was that the two girls had not only been arrested illegally, but unjustly and that McLaurin had been arrested not only illegally but unjustly, and that

> if this was the kind of society and the kind of system that arrested people unjustly and illegally and called it legal and just, then I felt all the legal and just people should be in jail because I feel that in an illegal and unjust system and society, the real just people will wind up in jail simply because the unjust and illegal people will not tolerate any kind of honest or just thinking or actions (RC 60).

Petitioner Cobb did not intend his listeners to go to jail by committing violence, but intended that the crowd "just go on in voluntarily into the cells" (RC 62).

The prosecution witnesses testified that the crowd of about 200 was "angry" (RC 30) and "muttering" (RC 43, 52), but that no threat of violence emanated from the crowd (RC 52-53). There was no evidence that Cobb's speech disturbed a court in session. The crowd did nothing to hinder the arrest of petitioners, nor did the arresting officers fear such hindrance (RD 36).

***Cobb Resisting Arrest Case***

After Officer Martin told petitioner Cobb that he was under arrest for speaking without a permit (RD 32), he grabbed Cobb by the arm and dragged him into the police station (RD 33, 68). Officer Martin, outweighing petitioner Cobb by 100 pounds (RD 37), testified that Cobb "just put all his weight on me" (RD 33). Captain Tackett also testified as to what Cobb had done: "He was trying to back up, pushing back, and looking back over his shoulder, hollering, still shouting" (RD 46). After Cobb was pushed into the police station he went limp and was carried to the sergeant's desk for booking (RD 33). After

booking, Cobb voluntarily got up and walked to his cell (RD 34).

***How the Federal Questions Were Raised and Decided Below***

In the County Court of Washington County, petitioners preserved each of the issues presented here by a motion for directed verdict (RA 62-63; RB 52-53; RC 56-57; RD 64-65) and by a motion for new trial (RA 96-97; RB 16a-16b; RC 15-16; RD 17-18); these motions were denied (RA 63, 97; RB 53, 16b; RC 57, 16; RD 66, 18).

In the Circuit Court of Washington County, petitioners preserved each of the issues presented here in their assignments of errors (RA 104; RC 80).[7]

In the Supreme Court of Mississippi, petitioners preserved each of the issues presented here (RB 93; RC 101; RD 100).[8] The Supreme Court of Mississippi considered and determined on the merits each of the issues raised in this petition (App. pp. 2a-3a; 187 So. 2d at 855, 860-61; RA 207).

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[7] The assignments of errors in petitioners' resisting arrest cases were omitted from these records.

[8] The assignment of errors in McLaurin's breach of the peace case was mistakenly omitted from that record.

## REASONS FOR GRANTING THE WRIT

### I.

**Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions, Which Punish Them for the Exercise of Their Federal Constitutional Rights of Free Speech, Assembly and Petition and Conflict With Decisions of This Court.**

Petitioners were charged with "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (RA 3; RC 5). Petitioners submit that Mississippi may not constitutionally punish them pursuant to these charges for engaging in the type of conduct which this record reveals.

This record reveals that petitioners' conduct consisted solely of speech—speech, to be sure, of a vigorous and stirring nature—but constitutionally protected speech nonetheless. The speeches which petitioners gave were to a crowd of about 200 Negroes on the public sidewalk, most of whom had just left a segregated courtroom after witnessing the trial and conviction of two Negro girls for having sought to enjoy a white-only municipal park. They were speeches of protest designed to draw public attention to the evils of racial discrimination and segregation as practiced in the community. Petitioners intended to stir persons in the crowd to action, viz., assertion of their federal rights. The fact that petitioners were arrested before they could fully make their point about the necessity of Negroes registering to vote and exercising other federal rights does not

deprive them of federal protection. What petitioners did succeed in saying merely amounted to a call to action; but nowhere in the record is there any indication that it was a call to unlawful action. What petitioners said may have "brought about a condition of unrest", but it has long since been settled by this Court that a conviction resting on that ground may not stand. *Terminiello* v. *Chicago,* 337 U. S. 1, 5 (1949).

Petitioners could constitutionally be punished only if they intended to incite their listeners to riot or used language whose natural and foreseeable effect under the circumstances would provoke their listeners to acts of violence.[9] Thus, the central issue presented here is whether the design or content of petitioners' speech (analyzed in the context of the composition and mood of the crowd) exceeded the boundaries of protected free speech. Petitioners submit it did not.

The constitutional guidelines for decision here are provided by *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Cox* v. *Louisiana,* 379 U. S. 536 (1965). Analysis of these cases reveals that petitioners' speeches merit no less federal protection than that afforded the speeches delivered in *Edwards* and *Cox.*

In *Edwards,*

> the petitioners engaged in what the City Manager described as 'boisterous', 'loud', and 'flamboyant' conduct, which, as his later testimony made clear, consisted of listening to a 'religious harangue' by one of

[9] The record makes clear that no profane language was used by the petitioners. Nor is there any evidence in the record that petitioners disturbed a court in session.

> their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands (372 U. S. at 233).

The speaker in *Edwards* had "harangued" approximately 200 of his followers and at least an equal number of bystanders on the State House grounds in Columbia, South Carolina. His and his followers' breach of the peace convictions were reversed by this Court, holding that their constitutionally protected rights of free speech, assembly and petition had been exercised "in their most pristine and classic form" (372 U. S. at 235).

Cox had addressed a group of about 2,000 young Negro students on the sidewalks between the State Capitol and the courthouse in Baton Rouge, Louisiana. His was a speech of protest (379 U. S. at 542-43):

> [Cox] gave a speech, described by a State's witness as follows:
>
> > He said that in effect it was a protest against the illegal arrest of some of their members and that other people were allowed to picket . . . and he said that they were not going to commit any violence, that if anyone spit on them, they would not spit back on the person that did it.
>
> Cox then said:
>
> > All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination.

> These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.

The Sheriff testified that, in his opinion, constitutional protection for the speech ceased "when Cox, concluding his speech, urged the students to go uptown and sit in at lunch counters" (379 U. S. at 546), but this Court disagreed:

> The Sheriff testified that the sole aspect of the program to which he objected was '[t]he inflammatory manner in which he [Cox] addressed that crowd and told them to go on uptown, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour.' Yet this part of Cox's speech obviously did not deprive the demonstration of its protected character under the Constitution as free speech and assembly (379 U. S. at 546).

The court below relied upon *Feiner* v. *New York*, 340 U. S. 315 (1951) (App. pp. 12a-13a; 187 So. 2d at 859-60; RA 218), but that case is no more applicable to this than it was to *Edwards* and *Cox*. Both *Edwards*[10] and *Cox*[11] distinguished *Feiner*, involving as it did a case where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" (340 U. S. at 321).[12]

Analysis of the record reveals that the decision of the court below affirming petitioners' convictions conflicts with

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[10] 372 U. S. at 236.

[11] 379 U. S. at 551.

[12] Both *Edwards* and *Cox* also distinguished *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), which involved "fighting words" on the part of the speaker.

*Edwards* and *Cox*. Here, petitioners neither intended to incite their listeners to riot, nor used language creating, under the circumstances, a clear and present danger of riot. Like the speakers in *Edwards* and *Cox*, petitioners intended to encourage their listeners to assert their federal rights. They intended to tell the crowd that if they registered to vote they could eradicate racial discrimination and segregation in the community. As in *Edwards* and *Cox*, the content of the speeches here was stirring and vigorous, but not suggestive of violence. Nor were the speeches disguised invitations to riot, subtly concocted to exploit an explosive situation.

Petitioners' listeners were far fewer in number than in *Edwards* and *Cox*—about 200 Negroes and a few whites—most of whom had just witnessed, in a segregated courtroom, the trial and conviction of two Negro girls for using a white-only, municipal park.[13] No one in the crowd was armed and no one gave any indication of committing an act of violence. More pointedly, following the arrest of petitioners, their listeners quietly went home. It is true that the crowd was "muttering" and appeared tense and upset. Such was also the case with a larger number of onlookers in *Cox* (379 U. S. at 543, 550). But here, as in *Cox*, that fact cannot justify suppression of petitioners' speech. Nor can this Court accept at face value the unsupported assertions of police witnesses that an imminent danger of breach of the peace existed. This Court must go behind that conclusionary testimony and "make an independent examination of the whole record" (*Edwards, supra*, 372 U. S. at 235, *and cases cited*). To fail to do so would increase the danger

[13] There is no evidence in the record that an appreciable number of persons hostile to petitioners' cause had been attracted to the scene.

of police officers suppressing speech according to their "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*" (*Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966)).[14]

## II.

**Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions, Which Deprive Them of Their Liberty Without Due Process of Law Because Founded Upon No Evidence of Guilt.**

Since in Part I, *supra*, it was shown that the record reveals no conduct of petitioners which the State of Mississippi has a right to prohibit as a breach of the peace, petitioners' breach of the peace convictions offend the due process clause of the Fourteenth Amendment because there is a total absence of evidence in the record that petitioners "disturb[ed] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (RA 3; RC 5). *Thompson* v. *Louisville*, 362 U. S. 199 (1959); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962).

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[14] Even if the crowd had been disorderly, petitioners would still maintain that they could not be punished, since they had neither intended to provoke violence nor used language creating, under the circumstances, a clear and present danger of violence. At the very least, they could not be arrested until the police had first attempted to control or disperse the crowd. *Cf.* petitioners' refused instructions (RA 12; RC 12). Otherwise, petitioners' conduct could be declared "criminal simply because [their] neighbors have no self-control and cannot refrain from violence" (Chafee, *Free Speech in the United States*, 151 (1954), quoted in *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966)). The court below appears to have taken a contrary view (App. p. 12a; 187 So. 2d at 859; RA 217-18).

Moreover, when petitioners' breach of the peace convictions fall, for reasons tainting petitioners' arrests, there is similarly no evidence to support the charge that petitioners, by attempting to brace their feet and later by going limp, resisted a police officer "in executing or attempting to make a lawful arrest" (RB 8; RD 6).[15]

## III.

**Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions Under a Statute Indistinguishable From That Declared Facially Unconstitutional by This Court in *Cox* v. *Louisiana*.**

Petitioners stand convicted of violating Miss. Code Ann. §2089.5 (Supp. 1964), which punishes any person who disturbs the public peace or the peace of others by, *inter alia*, "conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace." Other sorts of disturbances of the peace denounced by the statute are not implicated by petitioners' conduct,[16] and, in

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[15] The juries which convicted petitioners of resisting lawful arrest were correctly charged by the trial judge that petitioners could not be convicted unless they were found to have committed a breach of the peace in the arresting officer's presence (RB 9, 15; RD 7, 12, 13). See *Wright* v. *Georgia*, 373 U. S. 284, 291-92 (1963); *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965).

[16] Section 2089.5 punishes disturbance of the peace by any of the following acts: (a) violent or loud or insulting or profane or indecent or offensive or boisterous conduct or language; (b) intimidation; (c) conduct calculated to provoke a breach of the peace or which may lead to a breach of the peace, or (d) "any other act."

(a) The police testimony below establishes that petitioners' conduct was not violent, insulting, indecent or profane. Their speech was loud, but there is no showing that it was louder than necessary in order to reach a large outdoor audience. Nor is there any showing that it was offensive or boisterous under any test that could

any event, the trial court's charge permitted their conviction on a finding that they violated the quoted language without more.[17] For these reasons the convictions must be reversed under settled principles if the quoted language is unconstitutional.[18]

In *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965), this Court held virtually identical language "unconstitutionally vague in its overly broad scope." That decision made clear that earlier holdings of the Court, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964), upsetting breach of the peace convictions had rested not merely on the ground that the defendants' conduct in each case was within the scope of free expression protected by the First and Fourteenth Amendments, but also on the independent ground that, where invoked to punish acts of

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escape condemnation under this Court's decision in *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

(b) There is not the slightest suggestion of intimidation in the record.

(c) The incipient-breach-of-the-peace portions of the statute are those discussed in the text. Although the opinion of the Mississippi Supreme Court is not altogether clear on the point, it appears that these were the portions which that court believed petitioners had violated. See RA 215-216, 218-219.

(d) The provision relating to "any other act" is so patently vague and overbroad within the principles of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), as not to require further discussion here.

[17] See RA 6; RB 9; RC 7; RD 7.

[18] *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291-293 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). Cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 92 (1965).

public protest and demonstration, such vague conceptions as "calculated to provoke a breach of the peace" failed to meet those "[strict] standards of permissible statutory vagueness" which the Amendments demand when a State undertakes to regulate speech activity. *NAACP* v. *Button*, 371 U. S. 415, 432 (1963), and authorities cited; see also *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-487 (1965). And in *Ashton* v. *Kentucky*, 384 U. S. 195, 200-201 (1966), the Court reaffirmed the principle of *Cox* that these vague incipient-breach-of-the-peace regulations are facially impermissible.

The court below distinguished *Cox* on the ground that "The factual situation involved in this case is entirely different. . . ." (App. p. 13a; 187 So. 2d at 860; RA 218-219.) Petitioners have shown in the preceding sections of this petition that the "factual situation" here is not materially different than that in *Cox*. But even if it were, the *ratio decidendi* below ignores the vital point that *Cox* did not turn solely on the facts there presented but upon the considered declaration by this Court that the statutory language challenged in *Cox* and substantially identical with that challenged here was unconstitutional on its face.[19] Obviously, then, the decision below is inconsistent with an applicable decision of this Court within the meaning of Rule 19(1)(a) governing the granting of certiorari. It is an important and dangerous decision because it frontally undercuts the protection of free expression which this Court

[19] Perhaps petitioners might be punished even under a facially unconstitutional statute if their conduct were the sort of "hard core" activity described in *Dombrowski* v. *Pfister*, 380 U. S. 479, 491-492 (1965). But on this record it is impossible to so characterize their conduct.

has recently and explicitly announced, and for this reason alone it imperatively requires review by this Court lest the reception of *Cox* by the state courts render this Court's opinion there a futile exercise. Cf. *Henry* v. *City of Rock Hill, supra.*

## IV.

**Certiorari Should Be Granted to Review and Reverse Petitioner Cobb's Conviction for Resisting Arrest Because His Right to Equal Protection of the Laws Was Violated by the Trial Court's Refusal to Permit Him to Show Systematic Exclusion of Negroes From the Petit Jury Through Prosecutorial Abuse of Peremptory Challenges.**

In McLaurin's appeal, the Mississippi Supreme Court correctly found that counsel had been permitted to present such evidence as he had on the prosecutor's discriminatory use of peremptories (App. pp. 9a-10a; 187 So. 2d at 858; RA 21, 214). And it properly held that the evidence available at that time was inadequate to sustain the contention (App. pp. 9a-10a; 187 So. 2d at 858; RA 214-15). But in affirming Cobb's resisting-arrest conviction on authority of *McLaurin*, that court ignored the circumstance, plainly shown by the *Cobb* record as quoted below, that in this case counsel had for the first time sought to demonstrate the accumulated experience of the prosecutor's peremptory practice during the week's trials and had been refused the opportunity to do so:

> . . . Your motion is well in the record and your motion specifically states what you are seeking to do and the Court understands that and the record shows

that, and if this Court is in error by not permitting you to show that pattern, then you don't have to show that pattern to the Supreme Court at all, the Supreme Court will reverse it because it didn't let you do it. Your record is all right for that purpose (RD 25-26).

Petitioner Cobb contends that under *Swain* v. *Alabama*, 380 U. S. 202, 224 (1965), he was entitled to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." Assuredly, the period here was short, but it covered a series of related cases involving civil rights matters tried by the same prosecutor in the same court. The question raised is whether, in view of the difficulty of recording and preserving evidence with regard to the volatile practice of exercising peremptory challenges, the proffer made here was sufficient within *Swain*. This Court should grant certiorari to determine that question.

## CONCLUSION

**For the foregoing reasons, the petition for writ of certiorari should be granted.**

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